SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
SEP 29 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-4511

JACK MACE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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In the
Supreme Court of the United States

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No.

JACK MACE,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on August 30, 1971.

Opinions Below

The judgment of the Court of Appeals was rendered without opinion pursuant to Rule 36 of the Federal Rules Appellate Procedure. No opinion was rendered by the District Court for the District of Maryland.

Judgments Below

The judgment of the United States District Court for the District of Maryland was entered on January 19, 1971.

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 30, 1971 and is annexed hereto as Appendix A commencing at page 14.

The judgment of the District Court is annexed hereto as Appendix B commencing at page 15.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered on August 30, 1971, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 22(2).

Question Presented

Was the petitioner Mace properly joined with co-defendants in this case under Rule 8(b) of the Federal Rules of Criminal Procedure.

Statutes Involved

18 U.S.C.A.

Section 2. *Principals*

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C.A.

Section 2314. *Transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting.*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; ... shall be fined not more than $10,000 or imprisoned not more than ten years or both.

18 U.S.C.A.

Rule 14, F.R.C.P. *Relief from Prejudicial Joinder*

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires ....

18 U.S.C.A.

Rule 8. *Joinder of Offenses and of Defendants*

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Statement of the Case

This is a petition for certiorari brought after an appeal from judgments of conviction which were entered January 19, 1971 on a superseding indictment returned on September 29, 1970, charging the petitioner in counts two, three and four with violations of Title 18, Sections 2314 and 2.

Count two charged that the petitioner and others on May 1, 1968 transported stolen securities from New York to Maryland, knowing the same to have been stolen.

Count three charged that the petitioner and others on May 14, 1968, transported stolen securities from New York to Maryland, knowing the same to have been stolen.

Count four charged that the petitioner and others on May 17, 1968 transported stolen securities from New York to Maryland, knowing the same to have been stolen.

Count one charged four other men with having on April 16, 1968, transported stolen securities from Massachusetts to Baltimore, knowing the same to have been stolen.

Trial commenced on November 16, 1970 and prior to the submission of the case to the jury, the trial court directed the jury to consider counts two and three as merged (Tr. 1330).[1] The jury returned verdicts of guilty to counts two and four on November 25, 1970.

On each of the four counts contained in the indictment, the government's case depended upon the testimony of one Vincent Teresa. The common denominator to all four counts was the involvement of Teresa, who was not named as co-defendant, and his partner in crime, Daniel F. Mondavano, who was named as co-defendant, but neither testified or was tried with the petitioner.

Vincent Teresa testified that prior to his involvement

[1] "Tr." refers to the transcript of the proceedings in the District Court.

in the offenses that led to the instant indictment, he was in the "junket" business (Tr. 765, R.A. 29).[2] In January or February of 1968, while on a junket in London, England, he met a Mr. Schwartz (Tr. 765, R.A. 29) of Baltimore, who was attracted to a dishonest crap game in Teresa's hotel suite and promptly was swindled out of $17,000.00 (Tr. 767, R.A. 31). Teresa and Schwartz discussed the loaning of money at usurious rates of interest (Tr. 768, R.A. 32) and on return to the United States, Teresa and his partner traveled to Baltimore, met Stewart Harrison (an associate of Schwartz) and borrowed $10,000.00 from Schwartz and agreed to pay $300.00 per week in return therefor (Tr. 772, R.A. 36). During the course of further talks between Teresa, Schwartz and Harrison, they discussed construction of a hotel and gambling casino in Haiti (Tr. 773, R.A. 37). Arrangements were made to travel to Haiti, with a stopover in Miami (Tr. 776, R.A. 40) The stopover resulted in the inevitable crap game in Teresa's suite at the Hilton Plaza and Harrison was cheated out of approximately $12,000.00 (Tr. 777, R.A. 41). Schwartz agreed to guarantee the loss (Tr. 778, R.A. 42) and a few days later, Mondavano traveled to Baltimore and collected the money (Tr. 778, R.A. 42). About a week later, Teresa spoke to Harrison who was "real desperate" to get money (Tr. 781, R.A. 45).[3]

The evidence on Count One

Shortly after speaking to Harrison, Teresa had a conversation with Robert L. Cardillo who told Teresa that he had some "Jefferson School Bonds" (Tr. 782, R.A. 46). Teresa called Harrison and told him a concocted story of

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[2] "R. A." refers to Record Appendix to brief for appellant filed in court below.

[3] Thus, the stage was set for the involvement of Harrison, and eventually Schwartz, in disposing of stolen securities that were transported from Boston and New York to Baltimore.

having received them from a Boston bookmaker. He told Harrison the bonds were legitimate and asked if he could cash them. Harrison asked that they be sent to him and agreed to see what he could do (Tr. 782, R.A. 46). Teresa discussed the stolen origin of the bonds and the price to be received with co-defendants Sarno, Cardillo, Mondavano and LaMattina (Tr. 784, 785, R.A. 48, 49). Mondavano and Sarno flew to Baltimore, went to Harrison's office and Harrison negotiated a $30,000.00 loan, using the bonds as collateral (Tr. 786, 787, R.A. 50, 51). Harrison kept $8,000.00; Sarno and Cardillo received $11,000.00; Teresa, LaMattina and Mondavano shared the remaining $11,000.0 (Tr. 787, 788, R.A. 51, 52). Harrison who "presumed" the bonds were legitimate, began calling Teresa "every day" for more bonds (Tr. 788, R.A. 52).

The Evidence on Counts Two and Three

Teresa called the petitioner, Jack Mace, and a man named Tortorello in New York and asked if they had any bonds that he could buy (Tr. 788, 790, R.A. 52, 54). A day or two later, the petitioner Mace and defendant Tortorella telephoned Teresa, informed him they had two $100,000.00 stolen United States Treasury Bonds and about $50,000.00 in smaller denominations (Tr. 791, R.A. 55). A price was agreed upon and co-defendants Mondavano and Hirschfeld went to New York (Tr. 792, R.A. 56), met the petitioner in the lobby of the Americana Hotel and received the bonds (Tr. 797, R.A. 61). The following day, Teresa traveled to New York and by prearrangement, met Harrison at the hotel (Tr. 798, R.A. 62). Teresa told Harrison the bonds were stolen (Tr. 799, R.A. 63). The following morning, Mondavano and Hirschfeld delivered $253,000.00 worth of bonds to Harrison in Baltimore (Tr. 801, 802, 803, R.A. 65, 66, 67). One of the $100,000.00 bonds was nego-

tiated for a $70,000.00 loan (Tr. 803, R.A. 67). Harrison kept $18,000.00 of the proceeds (Tr. 803, R.A. 67). Harrison gave the balance of $25,000.00 to Mondavano and the money was brought back to Teresa in Boston where it was divided up (Tr. 804). On May 14, Teresa met Harrison in London and told him to cash another bond (Tr. 816, R.A. 80). A couple of days later, Harrison called and told Teresa he had cashed it. Mondavano and LaMattina went to Baltimore and brought $72,000.00 back to Teresa (Tr. 817, R.A. 81).[4]

The Evidence on Count Four

Teresa received a call from Tortorella who told him he had three $100,000.00 Treasury Bills that were recently stolen and could be cashed without problems (Tr. 820, R.A. 84). Teresa then talked to Mace who confirmed what Tortorella had told Teresa but wanted "front money" for the securities (Tr. 822, R.A. 86). Teresa called Harrison who said the transaction was "a little bit heavy for him" and that he would have to let Schwartz know the bonds were stolen (Tr. 822, R.A. 86). Schwartz called Teresa and said he would take the bonds and had an "out for them" other than Baltimore (Tr. 823, R.A. 87). Mace wanted some money in advance, and Teresa borrowed $25,000.00 from the co-defendant Mastrototoro (Tr. 823, R.A. 87) and told him what the money was for (Tr. 831, 832, R.A. 86, 87) and agreed to pay Mastrototoro $10,000.00 interest for the loan (Tr. 832, R.A. 87). Mondavano flew to New York, gave the $25,000.00 to the defendant Mace, received the three $100,000.00 Bills and brought them to Schwartz in Baltimore (Tr. 832, R.A. 87). Schwartz tried to negotiate the bonds in Las Vegas but "got caught" (Tr. 833, R.A. 97) and the bonds were turned over to the F.B.I. (Tr. 834, R.A. 98).

[4] The remaining $53,000.00 of bonds were "for some unknown reason" never cashed (Tr. 835, R. A. 99).

Reasons for Granting the Writ

The decision by the Court below in the case at bar was rendered without opinion and is in conflict with the law of several circuits and with the law expressed in *McElroy* v. *United States,* 164 U.S. 76 (1896); *Kotteakos* v. *United States,* 328 U.S. 750 (1946); and the majority and minority opinions in *Schaffer* v. *United States,* 362 U.S. 511 (1960), a 5-4 decision. Further, the decision leaves much doubt as to the law in the 4th Circuit as stated in *Ingram* v. *United States,* 272 F.2d 567 (4 Cir. 1959).

McElroy v. *United States,* 164 U.S. 76 (1896) applied Section 1024 of the Revised Statutes, the equivalent of the modern F.R.C.P. 8(b) and held that it was improper to join separate and distinct offenses even though the defendants were the same. *Kotteakos* v. *United States,* 328 U.S. 750 (1946) dealt with several defendants charged with separate conspiracies linked by a common conspirator, and it was held that the defendants were improperly joined. The Court analogized this case to a wheel with a common hub, several spokes but lacking the rim which would tie it all together and justify joinder.[5]

Schaffer v. *United States,* 362 U.S. 511 (1960) was decided by a closely divided court which recognized that the *Kotteakos'* requirement of a "rim" was present in the form of a common conspiracy count but that this "rim" was dismissed after the government ended its case. The five justice majority held that the initial joinder under 8(b) was proper even though the "rim" was dismissed later. The Court went on to say that severance might have been granted under Rule 14 had there been a showing of prejudice but at any rate the Court found that the re-

[5] Like *Kotteakos*, there are several distinct counts and defendants joined together by one individual, common to all of them, a hub and spokes but no rim.

quired rim had been present. The minority opinion in that decision stated that when the "rim" was removed there was sufficient prejudice per se to warrant severance, without a specific showing. In the case at bar there is no common count linking the petitioner to all the other co-defendants, as the common count justified the joinder in *Schaffer*.

> "... [E]ven if the defendants are the same in all the indictments consolidated (the defendants are not the same in the case at bar), we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence and in no sense resulting from the same series of acts." *McElroy* v. *United States, supra,* 164 U.S. at 80.

In the case at bar no evidence was introduced by the government from which the jury could reasonably infer that the petitioner was in any way involved in the offense charged in Count 1 of the indictment. Only one defendant, Sarno, named in Count 1, was on trial with the petitioner and he was not charged in any of the remaining three counts. The common link, the "center" of the wheel was the government's witness Vincent Teresa who was admittedly a co-participant in the crimes charged but was not on trial.

Count 1 is against a defendant not charged in the counts brought against the petitioner. Although it is a like felony, it is wholly distinct from the charges against the petitioner and not provable by the same evidence. If the Court below decided that the petitioner was properly joined, its decision was in conflict with standards outlined in *McElroy* v. *United States,* 164 U.S. 76 (1896), *Kotteakos* v. *United States,* 328 U.S. 750 (1946) and recognized by the Court in *Schaffer* v. *United States.* The decision in the case at bar is in conflict with the 4th Circuit ruling in *Ingram*

v. *United States,* 272 F.2d 567 (4 Cir. 1959). *Ingram* relied heavily on the *McElroy* decision in holding that "(t)he joinder of defendants and offenses totally unconnected is prohibited by Rule 8(b)." *Ingram* v. *United States, supra,* 272 F.2d at 569. Further conflict is noted with the 9th Circuit decision in *Williamson* v. *United States,* 310 F.2d 192 (9 Cir. 1962) which stated at p. 197:

> "Where multiple defendants are involved, Rule 8(b) requires that *each* count of the indictment arise out of the 'same series of acts or transactions' in which all defendants 'have participated.' "
>
> Also see *Culjak* v. *United States,* 53 F.2d 553 (9 Cir. 1931) and *Ward* v. *United States,* 110 U.S. App. D.C. 136, 289 F.2d 877 (D.C. Cir. 1961). Further conflict may be noted between the instant case and the following: *Metheany* v. *United States,* 365 F.2d 90 (9 Cir. 1966); *King* v. *United States,* 355 F.2d 700 (1 Cir. 1966); *Cupo* v. *United States,* 339 F.2d 990 (D.C. Cir. 1966); *United States* v. *Varelli,* 407 F.2d 735 (7 Cir. 1969), *United States* v. *Scott,* 113 F.2d 932 (7 Cir. 1969) where the defendants acts were found to be part of a series of acts. *Williams* v. *United States,* 416 F.2d 1064 (8 Cir. 1969) where it was found that the defendant participated in all counts.

The standards outlined by this Court in *McElroy, Kotteakos* and recognized in *Schaffer* are not precisely followed in *Haggard* v. *United States,* 369 F.2d 968 (8 Cir. 1966), cert. denied, 386 U.S. 1023 (1967) which reduces the necessity for a "common rim around the wheel" but even *Haggard* does not go so far from the standards of 8(b) as the decision in the instant case.

The decision rendered in the case at bar indicates an erosion of the right of defendants not to be joined with

other defendants and other charges outside the standards of Rule 8(b). This erosion is indicated either by a relaxing of the requirements of *McElroy* and *Kotteakos* or, as will be discussed, by the requirement that prejudice be shown when misjoinder occurs. Whether the standards have been relaxed, and if so, how much they have been eased is a question of importance to the administration of the criminal law in the federal courts and the issue should be resolved.

If on the other hand the Court below found misapplication of the standards of Rule 8(b), then the Court's affirming of this misjoinder could occur only on a harmless error theory. Such a theory, however, is in direct conflict with the law of several circuits and this Court's decision in *Kotteakos* and the minority opinion in *Schaffer*.

Kotteakos v. *United States, supra,* deals with the issue of prejudicial error involved in improper joinder and holds that regardless of how manifest the guilt of the defendant is the improper joinder was an error which permeated and infected the entire proceedings affecting the substantive rights of the parties. In addition, the four justice dissent in *Schaffer* stated:

> "It is not enough to say that evidence of the guilt of each of the present petitioners may have been clear. Reasons for severance are founded on the principle that evidence against one person may not be used against a co-defendant whose crime is unrelated to the others." *Schaffer* v. *United States, supra,* 362 U.S. at 523.

The majority in *Schaffer* never reached the issue of prejudice under Rule 8(b) because joinder was held to be proper.

> "A motion based upon misjoinder under Rule 8(b) does not . . . rest upon the discretion of the trial court as does a motion to sever under Rule 14 for 'prejudicial joinder.' If multiple defendants are misjoined, the trial court has no discretion, since misjoinder is prejudicial per se." *Haggard* v. *United States, supra,* at pp. 972, 973 (citing) *Metheany* v. *United States,* 365 F.2d 90 (9 Cir. 1966); *Ingram* v. *United States,* 272 F.2d 567 (4 Cir. 1959); *Ward* v. *United States,* 110 U.S. App. DC 136, 289 F.2d 877 (DC Cir. 1967); *King* v. *United States,* 355 F.2d 700 (1 Cir. 1966); *United States* v. *Spector,* 326 F.2d 345 (7 Cir. 1963).

The District of Columbia Court of Appeals refused to adopt the hypothesis that "any form of joinder not permitted by the terms of ... Rule 8 ... is *conclusively* presumed prejudiced." *Baker* v. *United States,* 401 F.2d 958, 973 (D.C. Cir. 1968). Nonetheless, the Court articulated its view that:

> "When unrelated offenses committed by separate defendants are joined for trial, in violation of Rule 8 (b), no further inquiry into special prejudice is required. Such a rule is justified since the introduction at the trial of one defendant of evidence which in law is relevant only to the guilt of another *in itself* is prejudicial, and it would be inappropriate to speculate as to the extent to which that evidence may have affected the deliberations of the jury or embarrassed the defendant in presenting his defense." *Baker, supra,* at pp. 973, 974. See also *Drew* v. *United States,* 118 U.S. App. D.C. 11, 331 F.2d 85 (D.C. Cir. 1964).

The case at bar avoids the general rule that prejudice will be presumed when cases are misjoined and further

rejected the more limited rule in *Baker* that prejudice will be presumed only in those cases where the offenses and defendants are unrelated and joinder occurs (which rule would apply in this case).

It seems to the petitioner that the interests of efficient administration of justice may call for consolidation of cases, especialy when one witness may give testimony in all the cases. But such efficiency should not supersede the rights of a defendant "... not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others ..." *Kotteakos* v. *United States, supra,* 328 U.S. at 775. The rights of the petitioner and all defendants can be protected by maintaining strict conformance to the standards of Rule 8(b) and by adhering to the presumption of prejudice when misjoinder occurs.

The issue presented by the petitioner dealing with prejudicial misjoinder is of great importance in the proper administration of criminal law in the federal courts and should be resolved definitively by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH J. BALLIRO
44 School Street
Boston, Massachusetts
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1239
UNITED STATES OF AMERICA,
APPELLEE,
v.
JACK MACE,
APPELLANT.

Appeal from the United States District Court for the District of Maryland, at Baltimore.

On instruction from the Court after its consideration of the record and briefs, and after hearing the argument at bar of appellant's counsel, judgment is hereby entered, under Rule 36 of the Federal Rules of Appellate Procedure, affirming the order on appeal in this case.

(s) SAMUEL W. PHILLIPS
Clerk

FILED
AUG 30 1971
SAMUEL W. PHILLIPS
CLERK

A True Copy,
Teste: SAMUEL W. PHILLIPS, Clerk
By (s) FRANCES S. SEWELL
Deputy Clerk
[SEAL]

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal Docket No. 70-0363N.

THE UNITED STATES

vs.

JACK MACE

JUDGMENT AND COMMITMENT

(Rev. 7-52)

On this 19th day of January, 1971 came the attorney for the government and the defendant appeared in person and "by counsel".

IT IS ADJUDGED that the defendant has been convicted upon a Jury Verdict of "Guilty" as to Counts Nos. 2 (Ct. 3 merged with Ct. 2) and 4, of the offense of (Counts Nos. 2 [Ct. 3 merged with Ct. 2] and 4) Interstate transportation of stolen securities; aiding and abetting, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being sworn or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Fifteen (15) Years; Defendant to become eligible for parole at such time as the Board of Parole may determine pursuant to Title 18 USC, Sec. 4208(a)(2).

A True Copy, Tests:
Samuel W. Phillips, Clerk
By (s) VIRGINIA LIPARD
Deputy Clerk
[SEAL]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

(s) EDWARD S. NORTHROP
Chief Judge,
United States District Court